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No. 83-1868

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN E. WHITE, APPELLANT

v.

DOUGHERTY COUNTY BOARD OF EDUCATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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34pp

QUESTIONS PRESENTED

1. Whether a decision by appellee Board of Education not to grant employees unpaid leave to perform the duties of elective office after April 1980 constituted "enact[ment]" of a standard, practice, or procedure "different from that in force or effect on November 1, 1964," within the meaning of Section 5 of the Voting Rights Act.

2. If so, whether the Board's policy constituted a standard, practice or procedure "with respect to voting," within the meaning of Section 5 of the Voting Rights Act.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINION BELOW

The opinion of the three judge district court (J.S. App. A1-A72) is reported at 579 F. Supp. 1480.

JURISDICTION

The judgment of the three judge district court (J.S. App. A73) was entered on February 13, 1984. On March 1, 1984, the district court denied a motion to alter or amend (J.S. App. A74-A75). The notice of appeal (J.S. App. A76) was filed on March 14, 1984, and the jurisdictional statement was filed on May 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATEMENT

1. The earlier history of this dispute is recounted in *Dougherty County Board of Education* v. *White (White I)*, 439 U.S. 32, 34-36 (1978). In May 1972, appellant, a vocational counselor employed on a 12-month basis by appellee Dougherty County Board of Education, announced his candidacy for the Georgia House of Representatives. He was apparently the first black person in recent memory to run for this office from Dougherty County, as well as the first employee of the Board ever to run for public office. Less than a month later, the Board adopted a rule ("Rule 58") requiring employees to take an unpaid leave of absence during any period in which they are a candidate for public office and during their period of service, if elected. The Board did not submit Rule 58 to the Attorney General or the District Court for the District of Columbia for preclearance under 42 U.S.C. 1973c. In *White I*, this Court held that "Rule 58 is a standard, practice, or procedure with respect to voting enacted by an entity subject to § 5" and affirmed a district court order enjoining its implementation (439 U.S. at 47). The Board rescinded Rule 58 on April 11, 1977 (J.S. App. A8).

Prior to 1972, the Board had no special policy regarding leaves for political purposes. The Board allowed employees to be absent, with pay, for jury duty, vacation (ten days per year), personal leave (three days per year), sick leave, military leave, and maternity leave (J.S. App. A7-A8). Appellant's contract provided that his "annual salary shall be subject to an adjustment on a pro-rata basis for the number of days the employee does not work . . . due to employee's absence when there is no accumulative leave to cover such absence" (*id.* at A6-A7 (ellipses in original)).

Appellant was elected to the Georgia House in 1974, and has been reelected every two years since then. Pursuant to Rule 58, while it was in effect, appellant took an unpaid leave of absence during the legislative sessions in 1975, 1976, and 1977. After Rule 58 had been enjoined and rescinded, appellant requested and received permission to take an unpaid leave of absence to attend the 1978 legislative session.

In 1978, two other employees of the Board, Lillian Parkman and Don Cutler (a teacher and a principal), ran for and were elected to public office (J.S. App. A10). That year, the Board adopted the following policy, entitled "WORK SCHEDULE" (*id.* at A9):

> It shall be the policy of the Dougherty County School Board that each employee fulfill his/her contract in its entirety. That is, each ten (10) month employee shall fulfill his/her contract during the regular academic school year (August-June).
>
> * * * * *
>
> Twelve (12) month employees will be expected to work the entire twelve months except for vacation time.

After his reelection in November 1978, appellant requested the Board to allow him to be absent without pay during the 1979 and 1980 legislative sessions. The Board met on November 20, 1978, voted to "reaffirm its position concerning employees fulfilling their contracts in their entirety," and directed the Superintendant to notify appellant, Parkman, and Cutler of the decision. J.S. App. A9-A10. The three employees were invited to meet with the Board to discuss how they could perform their work responsibilities and also serve in their elected offices. At that meeting, on December 20, 1978, the Board agreed to

allow the employees unpaid leaves of absence for their political service for two years, during which time a study would be made of the effect of their absences on their job performance. The question would then be reconsidered in light of the study. J.S. App. A10-A11.[1]

On April 15, 1980, the Board revisited the question. The Superintendant reported that the two-year study showed that appellant's absences from work had an adverse effect on his job performance, and recommended that further requests for leaves of absence of this sort be denied. The Board adopted this recommendation by a vote of five to one. On November 26, 1980, appellant requested an unpaid leave of absence to attend the 1981 legislative session; this request was denied. J.S. App. A11-A12. Since that time, the Board has continued to deny appellant's requests for leave (J.S. App. A16).

Appellant has continued to serve in the Georgia House, using his personal leave and vacation time and limiting his appearances to the most essential portions of the sessions. J.S. App. A12, A16. The legislative sessions last 40 days, and take place in January, February, and March of each year. Appellant estimates that, if he were granted leave without pay, he would be absent approximately 45 school days each year (J.S. App. A16). This would constitute approximately 21% of the work year—28% if vacation and personal leave were figured in (J.S. App. A17).

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[1] The Superintendant promulgated administrative regulations to govern these leaves of absence, requiring the employees to give at least three days notice and obtain approval in advance. J.S. App. A11.

2. On March 10, 1981, appellant filed this action in the United States District Court for the Middle District of Georgia, alleging that the Board's policy of denying unpaid leaves of absence for service as an elected official constituted enactment of a "standard, practice, or procedure with respect to voting different from that in force on November 1, 1964," and thus that the policy should have been submitted for preclearance to the Attorney General or the United States District Court for the District of Columbia, as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.[2] The three judge district court held, in a divided opinion, that "this board's refusal to alter its neutral personnel policies to accommodate this employee elected officeholder does not possibly constitute a Section 5 'standard, practice or procedure'" (J.S. App. A47). The court thus found it "unnecessary to consider whether or not the conduct of the defendant board was 'with respect to voting'" (*id.* at A49).

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[2] Earlier, on December 31, 1980, appellant's counsel wrote the Chief of the Voting Section of the Civil Rights Division of the Department of Justice to inquire whether the Board had "submitted any regulations concerning political leave," and informing him that the Board had denied appellant leave "on the basis of a subsequent rule." See App., *infra*, 1a. On February 11, 1981, the Acting Assistant Attorney General wrote to the Board, stating that "[i]t has come to our attention that the Dougherty County Board of Education may have changed its policy on political leaves of absence" and requesting the Board to submit "this apparent change" for preclearance under the Act. App., *infra*, 2a. In subsequent communications, the Board denied that it had any policy on political leaves of absence (App., *infra*, 4a-5a, 8a-9a) and the Department of Justice took the position, based on the information then available to it, that the policy should be submitted for preclearance. App., *infra*, 6a-7a, 10a-11a.

ARGUMENT

Personnel practices of government employers, if directed at participation in the political process, can have a significant effect on the ability of potential minority candidates to hold themselves out for public office, and thus on the range of choices available to voters. As we pointed out in our brief as amicus curiae in *White I* (at 17-18), where black candidates are significantly more likely than white candidates to be drawn from the ranks of public employees—as census data from Georgia tended to bear out—a provision imposing a special burden on candidacy or officeholding by public employees "may place blacks at a substantial competitive disadvantage in seeking elective office and may seriously diminish citizens' opportunities to vote for black candidates." It was on this basis that the Court held, in *White I*, that a personnel rule requiring public employees who run for office to take an unpaid leave of absence, whether or not their candidacy would otherwise interfere with their performance of work responsibilities, was the functional equivalent of a filing fee and thus subject to preclearance under Section 5 of the Voting Rights Act.

This case potentially raises a question beyond that resolved by *White*: whether refusal to grant a special accommodation to the need of officeholders to be absent from work for a substantial percentage of the work year is a standard, practice, or procedure "with respect to voting" within the meaning of Section 5. This question was not reached by the three judge district court because the court found that appellant's claim was foreclosed on another ground: the Board's current practice does not reflect a "standard, practice, or procedure * * * different from that in force or

effect on November 1, 1964" (42 U.S.C. 1973c). In effect, the district court held that the Board has followed the same "standard, practice, or procedure" with respect to unpaid leaves of absence for elected officeholders since before enactment of the Voting Rights Act, with the exception of the period between 1972 and 1977, when Rule 58 was unlawfully in effect. Therefore, according to the district court, there was no need for the Board to submit its current "policy" for preclearance—whether or not it would be considered a "standard, practice, or procedure with respect to voting" within the meaning of Section 5.

We submit that this holding of the district court reflects a reasonable interpretation of the facts and raises no significant question of law. Accordingly, this Court should summarily affirm.

1. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, requires preclearance whenever a covered state or political subdivision "shall enact or seek to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." [3] The effect of this provision is that "elections may be held either under electoral rules in effect on November 1, 1964, or under rules adopted since that time that have been properly precleared." *City of Rome* v. *United States*, 446 U.S. 156, 182 (1980).[4]

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[3] For jurisdictions subjected to Section 5 on dates later than November 1, 1964, a change in voting procedures is judged against the procedures in effect on the jurisdiction's coverage date. 28 C.F.R. 51.2(d). For convenience, we will refer to November 1, 1964 as the benchmark date, without qualification.

[4] Once a voting procedure has lawfully been precleared and implemented, it has been held that the jurisdiction must ob-

If a jurisdiction submits a voting change to the Attorney General and the Attorney General enters an objection, the jurisdiction is precluded from enforcing the change unless it obtains a declaratory judgment in its favor from the United States District Court for the District of Columbia. The lack of preclearance effectively reinstates, by operation of law, the last policy or practice that was valid under Section 5, *i.e.*, the last precleared policy, if any, or that in effect on November 1, 1964. See *City of Rome* v. *United States*, 446 U.S. at 182-183 ("[w]hen the Attorney General refused to preclear the city's electoral changes, the city had the authority to conduct elections under its electoral scheme in effect on November 1, 1964"); *Terrazas* v. *Clements*, 537 F. Supp. 514, 523-524 (N.D. Tex. 1982) (three-judge court); *Graves* v. *Barnes*, 408 F. Supp. 1050, 1052 (W.D. Tex. 1976) (three judge court).

Similarly, if a jurisdiction fails to submit a voting change to the Attorney General for preclearance under Section 5 or to the District Court for the District of Columbia in a declaratory judgment action, it is precluded from enforcing the change. *Connor* v. *Waller*, 421 U.S. 656 (1975). Either the Attorney General or an aggrieved citizen may bring suit to enjoin its enforcement. *Allen* v. *State Board of Elections*, 393 U.S. 544, 554-557 (1969). In such a suit,

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tain preclearance if it decides to deviate from that procedure—even if it would return to the procedure in effect on November 1, 1964. *Dotson* v. *City of Indianola*, 521 F. Supp. 934, 943 (N.D. Miss. 1981) (three judge court), aff'd summarily, 456 U.S. 1002 (1982); *NAACP* v. *Georgia*, 494 F. Supp. 668, 677-679 (N.D. Ga. 1980) (three judge court). This ensures that any change from a lawful, enforceable, voting practice will receive Section 5 scrutiny.

the court's authority is limited to determining whether the unprecleared procedure was subject to Section 5 coverage. 393 U.S. at 555-556 n.19, 558-559, 561; see *Perkins* v. *Matthews*, 400 U.S. 379, 383-387 (1971). While in some circumstances, the court has the remedial discretion to order new elections, it would ordinarily "enter an order affording local officials an opportunity to seek federal approval" (*Perkins*, 400 U.S. at 396). "[I]f local officials fail to do so or if the required federal approval is not forthcoming," the court then might order new elections under prior, valid, procedures. *Id.* at 396-397; see *Berry* v. *Doles*, 438 U.S. 190 (1978). In effect, the jurisdiction has two options: to seek preclearance [5] or to return to prior, valid, procedures (and to conduct new elections, if necessary and ordered to do so).[6]

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[5] Of course, the jurisdiction may seek preclearance of a modified procedure if it chooses, or if a modified procedure is more likely to be approved.

[6] In *City of Pleasant Grove* v. *United States*, Civil Action No. 80-2589 (D.D.C. Oct. 7, 1981), the City attempted to obtain court approval of some, but not all, of certain already implemented annexations; it declared that it would simply "cease[] enforcing" the annexation it chose not to submit with the rest. The government took the position that the City was required to submit all of the effectuated annexations as "a single and unified whole" (see *City of Rome* v. *United States*, 472 F. Supp. 221, 247 (D. D.C. 1979), aff'd, 446 U.S. 156, 186 (1980)). Under these circumstances, the court held that "[i]t would completely contradict the purpose of the Voting Rights Act if a state or municipality were allowed to enforce a voting change without preclearance and then to escape an otherwise mandatory preclearance requirement simply by stating that it would no longer enforce that change." The court did not suggest that the City would not have had the discretion to rescind the entire group of annexations, if it chose, rather than submitting them for preclearance.

It follows that, when a jurisdiction has implemented a voting procedure without obtaining preclearance, and this comes to the jurisdiction's attention, it has the "opportunity" (*Perkins*, 400 U.S. at 396) to seek federal approval of the change; or, in the alternative, it may rescind the change and return to its last valid voting procedure. In other words, if a violation of Section 5 is discovered, the jurisdiction has the same options available to it as it would have if it were sued, and lost, in an action before a three judge district court. The decision of such a jurisdiction to return to a prior, valid, voting procedure would not itself require preclearance.

In cases where a jurisdiction had unlawfully implemented changes with respect to voting in the past without obtaining preclearance, but later rescinded those changes, the question becomes whether its present procedure (after rescission) is a change from the last procedure that was valid under Section 5—*i.e.*, its last prior precleared procedure, if any, or the procedure in effect on November 1, 1964. As it pertains to the circumstances of this case, the question is whether the Board's current policy with regard to unpaid leaves of absence for elective officeholders is a change from the last such policy that was valid under Section 5. Since the Board has never obtained preclearance for any policy regarding leaves of absence, the last valid policy was that in effect on November 1, 1964—a policy that continued until the unlawful adoption of Rule 58 in 1972. The question, therefore, is whether the Board's current policy (which rescinds the unprecleared and therefore unlawful policy of Rule 58) represents a change from that pre-1972 policy.

Appellant asks and answers another question. He contends (J.S. 22) that because "the Board authorized

by policy and practice political leaves of absence for the eight year period from 1972 until 1980," the Board's 1980 decision "to end the eight year practice" was an electoral change requiring preclearance. The flaw in this argument is that the practice adopted in 1972—Rule 58—was not precleared; at appellant's own instigation, that practice was enjoined in *White I* and then rescinded.[7] Nor were the decisions to grant unpaid leaves of absence for the 1978, 1979, and 1980 legislative sessions precleared (which they would have had to be if they constituted a "standard, practice, or procedure"). The question in this case does not depend, therefore, on whether the Board's current practice constitutes a change from that in effect between 1972 and 1980, but on whether it constitutes a change from that in effect between 1964 and the unlawful adoption of Rule 58 in 1972.

It is undisputed that in 1964 (and until 1972) the Board had no special policy concerning political leaves of absence (J.S. 18; Mot. to Aff. 5). After rescission of Rule 58 in 1977, appellant requested and was permitted to take an unpaid leave of absence to attend the 1978 legislative session. The district court found (J.S. App. A39-A40) that this "decision pertained only to Mr. White and his absence for that particular session; it thus did not constitute a 'standard, prac-

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[7] As the district court correctly stated (J.S. App. A32-A33):

> In determining whether or not any such standard, practice, or procedure was adopted, Rule 58, because it was found to be in violation of the Voting Rights Act and as a matter of law never in effect, see *Terrazas v. Clements*, 537 F.Supp. 514, 520 (D.C. Tex. 1982), cannot be taken into consideration. The earlier litigation between these parties "wiped [Rule 58] from the books" as if it never existed.

tice, or procedure pertaining to employee absence. It was nothing more than an individual personnel decision.' " This accords with our enforcement policy to the effect that individual personnel decisions regarding political participation by public employees do not constitute a "standard, practice, or procedure." But even if the individual grant of leave had constituted a "standard, practice, or procedure," it was not precleared and thus must be considered a legal nullity. *NAACP* v. *Hampton County Election Comm'n*, No. 83-1015 (Feb. 27, 1985), slip op. 8 n.19; *Connor* v. *Waller*, *supra*.

In 1978, the Board again granted a request for unpaid leave of absence for appellant, and also for newly-elected officeholders Parkman and Cutler, on an experimental basis. The district court found (J.S. App. A42) that this decision, too, "was nothing more than three individual personnel decisions." These decisions stand on the same footing as the 1978 decision.

The key question is the nature of the Board's practice since 1980. The district court noted (J.S. App. A43) that "[w]hile the defendant board labeled [its April 1980] decision as one establishing a policy on political leave, the board in reality decided not to allow its employees who are elected to public office greater time away from the job than they and all other employees are otherwise allowed." [8] Moreover,

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[8] The district court's reference to the Board having "labeled [its] decision as one establishing a policy on political leave" (J.S. App. A43) is based on the Board's adoption of a motion on April 15, 1980, stating "that no leaves of absence be granted to personnel of the Dougherty County School System for political purposes" (J.S. 9). In context, the district court reasonably concluded that this motion merely reflected the Board's decision *not* to adopt a special policy permitting

the district court found (*id.* at A43-A44) that the Board has continued to consider requests for unpaid leaves of absence on an individual, case-by-case basis.[9] The court concluded (*id.* at A45):

> [T]he board's April 1980, action constituted nothing more than its refusal to adopt a legislative leave policy and served in effect as a reaffirmation of its policy requiring employees to fulfill their contracts with the exception of time away from the job allowed to all.

Accepting for purposes of appellate review the district court's factual conclusion that the Board's 1980 decision (which remains the basis for its current practice) was "nothing more than [a] refusal to adopt a legislative leave policy" and that employees seeking leave for purposes of serving in elective office are treated in the same manner as are any other

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political leaves. Not adopting a special policy permitting political leaves is quite a different matter from adopting a special policy against granting political leaves.

[9] Appellant relies heavily (J.S. 19-20) on the following statement elsewhere in the district court's opinion (J.A. App. A17-A18):

> It is thus the policy and practice of the defendant board of education to deny its employees requests for leaves of absence without pay to attend to the duties of elective office and in so doing to require its employees holding elective office to abide by the same leave policies that are applicable to all employees.

Any apparent inconsistency between this statement and those at J.S. App. A43-A44, discussed in text, is easily resolved. The Board has not adopted any policy regarding unpaid leaves of absence for elective officeholders different from that for other unpaid leaves of absence. The general policy is that employees must fulfill their contracts; exceptions, if any, are made on an individual basis.

employees seeking unpaid leave,[10] it follows, as the district court held, that there has been no change from the policy in effect from 1964 through 1972.

The point may be illustrated by asking what policy or practice would be reinstated if a court found that the current practice is in violation of Section 5. If the current practice—no legislative leave policy; treatment of legislative leave in the same manner as any other unpaid leave request—is held unlawful and enjoined, what is the Board required to do? It cannot return to Rule 58, because that policy has already been enjoined and rescinded. It cannot return to the practice followed between 1977 and 1980, because that practice was never precleared. Its only option is to return to the practice in effect on November 1, 1964—*i.e.*, no legislative leave policy; presumed treatment of legislative leave in the same manner as any other unpaid leave request.

Appellant cannot have it both ways. Rule 58, adopted in 1972, was disadvantageous to him in some respects (it required him to take an unpaid leave of

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[10] We recognize that Judge Anderson, in dissent, expressed his view that the court's factual conclusion on this point "has a very weak support in the evidence" (J.S. App. A58) and "requires a strained interpretation of the evidence" (J.S. App. A62). However, for purposes of appellate review, the district court's factual findings must govern consideration of the case unless they are clearly erroneous. We do not understand that to be appellant's argument.

Judge Anderson's further argument—that, even assuming the court's factual conclusions to be correct, there was nonetheless a change requiring preclearance—rests entirely on a comparison of the current practice with that in effect between 1977 and 1980 (and perhaps 1972-1977 as well). J.S. App. A66. As explained at pages 10-11, *supra*, that is not the correct benchmark for comparison.

absence during his political campaigns) and advantageous to him in other respects (it effectively guaranteed him unpaid leave during legislative sessions). Having successfully obtained invalidation and rescission of Rule 58 in 1977, appellant is not in a position to complain that the Board's "decision * * * to end the eight year practice it had permitted" (J.S. 22) was unlawful—but only with regard to the aspect of Rule 58 that benefitted him. As appellant himself recognizes (*id.* at 28), the "substantive merits" of a political subdivision's practice—whether it benefits minority candidates or voters—is not determinative of the question of coverage.

Appellant's principal legal argument (J.S. 24-28) is that the decision below conflicts with *Perkins* v. *Matthews, supra.* In *Perkins,* this Court held, inter alia, that a challenged voting policy must be evaluated against the procedure that was *in fact* in force or effect on November 1, 1964, and not the procedure that theoretically should have been in effect. 400 U.S. at 394-395. Appellant contends (J.S. 26) that "this *Perkins* rule supports his position and warrants reversal." He reasons that in 1964, the Board did not have a policy regarding political leaves of absence, but that "had the question been posed prior to November 1, 1964, the Board would have adopted a policy permitting leaves (as it did with Rule 58 in 1972)" (J.S. 27).

This argument is without merit. *Perkins* stands for the proposition that in the "peculiar context" where one procedure was required by law on November 1, 1964, but another procedure was actually followed in the elections immediately before and after November 1, 1964, the procedure that was actually used should be deemed the procedure "in force and effect" at that time. Here, there is no dispute over

what policy was in force or effect in 1964; the only issue is whether the present policy represents a change. The district court found that there has been no change, and nothing in *Perkins* suggests that the facts as found must bear another interpretation.

Indeed, appellant's argument is inconsistent with his own argument, and this Court's holding, in *White I*. There, appellant argued and this Court held that Rule 58 was a change from the policy in effect in 1964. Appellant is therefore foreclosed from arguing in this case that the district court should have concluded that "in fact" Rule 58 was already in force or effect in 1964.

The decision below thus raises no significant question of law. While the factual question—whether the present policy is the same as that in effect in 1964—is open to honest disagreement (as the dissenting opinion demonstrates), that question has been satisfactorily and reasonably resolved by the district court. Appellant's position rests, in essence, on a comparison between the present policy and either the unprecleared policy in effect in 1972-1980 or a speculative policy (the same as that adopted in 1972) that might have been adopted by the Board in 1964 if the issue had been raised. Neither such comparison has any support in the law.[11]

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[11] We have reproduced in an appendix to this brief three letters from the Acting Assistant Attorney General to the Board, requesting the Board to submit for Section 5 review the policy at issue in this litigation. We have also reproduced two letters from the Board in response, and one letter from appellant's counsel to the Voting Section. These letters, together with a newspaper clipping provided by appellant, constituted the principal factual basis for the government's request to the Board. It is our practice, when informed of a matter that might require Section 5 review, to request a sub-

2. If this Court should conclude that the Board's current policy on unpaid leaves of absence for elective officeholders reflects a "standard, practice, or procedure * * * different from that in force or effect on November 1, 1964" (42 U.S.C. 1973c), it will be necessary to consider whether that policy is one "with respect to voting" (*ibid.*). The district court did not reach that issue (J.S. App. A49).

In *White I*, this Court held that a rule requiring public employees to take an unpaid leave of absence during the period of their candidacy for elective office is a "standard, practice, or procedure with respect to voting" within the meaning of Section 5. The Court noted (439 U.S. at 42) that the Board "made its mandatory leave-of-absence requirement contingent on candidacy rather than on absence during working hours." The rule was not a neutral policy regarding abstenteeism (*id.* at 42-43 n.12); rather, it "specifically addresse[d] the electoral process, singling out candidacy for elective office as a disabling activity" (*id.* at 40). The rule therefore "operate[d] in precisely the same fashion" as a filing fee. "By imposing substantial economic disincentives on employees who wish to seek elective office, the Rule burdens entry into elective campaigns and, concomitantly, limits the choices available to Dougherty County voters." *Ibid.*

Application of Section 5 to the employment practice

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mission or further information that would clarify the question of coverage. In this instance, the Board did not provide the full explanation of the nature of its political leave policy and its historical context, as was later supplied to the district court. In light of the fuller information subsequently available to the district court, we do not believe that the court's decision not to defer to the Department's preliminary conclusion as to probable coverage constitutes ground for reversal.

at issue here would require a considerable extension of the holding of *White I*. Indeed, footnote 12 of the Court's opinion in *White I* suggests that a policy treating political leaves of absence in the same manner as any other unpaid leave request would not require preclearance (439 U.S. at 42-43 n.12 (citations omitted)):

> Insofar as the Board is concerned about its employees' failure to discharge their contractual obligations while standing for office, it has a variety of means to vindicate its interest. The Board may, for example, prescribe regulations governing absenteeism, or may terminate or suspend the contracts of employees who willfully neglect their professional responsibilities. What it may not do is adopt a rule that explicitly and directly burdens the electoral process without preclearance.

As construed by the district court (J.S. App. A46), the Board's present practice is based on "neutral personnel policies and practices governing all forms of absenteeism. The defendant board has simply refused to alter those neutral policies and practices." Accepting that factual predicate for this case, it seems clear that the rationale of *White I* does not extend to this case. Accordingly, even if the Court were to conclude that the Board's current practice reflects a change from that in effect on November 1, 1964, it could affirm the decision below on that alternative ground.

CONCLUSION

The judgment of the three judge district court should be summarily affirmed.

Respectfully submitted.

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MARCH 1985

APPENDIX

December 31, 1980

Gerald W. Jones, Esq.
Chief, Voting Section
Civil Rights Division
United States Department of Justice
Washington, D.C. 20530

RE: *John White v. Dougherty County, Georgia Board of Education II*

Dear Mr. Jones:

My client John White has recently been denied a political leave of absence by the Dougherty County Board of Education. I enclose for your information my letter to the Board's attorney, Jesse W. Walters, Esq.

I would appreciate your advising me whether in fact the Dougherty County Board of Education has submitted any regulations concerning political leave. In the first lawsuit, of course, their discarded Rule 58 was enjoined. They have denied White leave this time on the basis of a subsequent rule. Prior to initiating any new litigation I do need to know whether they have submitted anything or received approval.

Also, I would appreciate any inquiry your Department might deem appropriate of the Board concerning their apparent non-compliance again with Section 5.

If you have any questions, please give me a call.

Very truly yours,

/s/ John R. Myer
JOHN R. MYER

Feb. 11, 1981

Jesse W. Walters, Esq.
Perry, Walters, Lippitt & Custer
409 North Jackson Street
P.O. Box 527
Albany, Georgia 31703

Dear Mr. Walters:

It has come to our attention that the Dougherty County Board of Education may have changed its policy on political leaves of absence for employees of the school system.

Our records fail to show that this possible change affecting voting has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act of 1965, as amended. It is necessary that a change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that the change does not have the purpose and will not have the effect of discrimination on account of race, color or membership in a language minority group. Changes in procedure which affect voting are unenforceable unless and until the Section 5 preclearance requirements have been met.

Should you elect to submit this apparent change to the Attorney General, please follow the procedures set forth in the enclosed Procedures for the Administration of Section 5. In addition, please provide us with a description of the practices or policies which have been in effect concerning granting, or not granting, leaves of absence, with or without pay, etc., since No-

vember 1, 1964, for political activity by employees of the Board of Education.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us what course of action the Dougherty County Board of Education plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Ms. Hallue Wright (202-724-7170) of our staff, who has been assigned to handle this submission. Please refer to File No. D6455 in any written response to this letter so that your correspondence will be properly channeled.

Sincerely,

JAMES P. TURNER
Acting Assistant Attorney General
Civil Rights Division

By:

GERALD W. JONES
Chief, Voting Section

PERRY, WALTERS, LIPPITT & CUSTER
Attorneys at Law
409 North Jackson Street
Post Office Box 527
Albany, Georgia 31703

February 18, 1981

Mr. James P. Turner
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

Re: JPT:CWG:HEW:gml
DJ 166-012-3
D6455

Dear Mr. Turner:

Yours of February 11, 1981 wherein you advise it has come to your attention that the Dougherty County Board of Education may have changed its policy on political leaves of absence for employees of the school system acknowledged.

The Dougherty County Board of Education has no policy on political leaves of absence for employees of the school system. Personnel who are under contract with the Dougherty County School System are expected to fulfill their contracts and give to the school system their full attention and energies. This applies to all contract personnel.

The Dougherty County School System did have a rule at one time pertaining to leaves of absence for political candidates. However, the Supreme Court of the United States in the case of *Dougherty County*

Board of Education v. White, 439 US 32, 58 LEd 269, 99 SCt. 368 (1978) held that such rule was in violation of Section 5 of the Voting Rights Act of 1965. Since and prior to that date the Dougherty County School System has had no policy regarding political leaves of absence for employees of the school system. All employees are dealt with in the same fashion concerning leaves of absence.

I will be happy to provide you with any further information you need concerning this matter.

Sincerely,

/s/ Jesse W. Walters
JESSE W. WALTERS

Apr. 23, 1981

Jesse W. Walters, Esq.
Perry, Walters, Lippitt & Custer
409 North Jackson Street
P.O. Box 527
Albany, Georgia 31703

Dear Mr. Walters:

This is in response to your letter of February 18, 1981, concerning Dougherty County Board of Education policy on political leaves of absence for employees of the school system.

Although you state that the Dougherty County school system has had no policy regarding political leaves of absence for its employees, information coming to our attention suggests that a change within the meaning of Section 5 may have occurred. For example, an article in *The Albany Herald* on Wednesday, April 23, 1980, stated that "the Dougherty County Board of Education voted 5 to 1 not to grant 'any leave of absence to its personnel for political purposes'." Previously, it is our understanding that the board granted unpaid leaves of absence; thus it is our opinion that a change in procedure has taken place.

As we indicated in our February 11, 1981, letter to you, any change in voting practices or procedures must be submitted for review under Section 5 to the Attorney General or to the United States District Court for the District of Columbia. See *Perkins* v. *Matthews*, 400 U.S. 379 (1971), and *City of Rome* v. *United States*, 466 U.S. 156 (1980).

Should you elect to submit this change to the Attorney General, please follow the procedures set forth in the enclosed Procedures for the Administration of

Section 5 (Section 51.18 *et seq.*, 46 Fed. Reg. 875-876).

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us within ten days of your receipt of this letter what course of action the Dougherty County Board of Education plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Hallue Wright (202-724-7170) of our staff, who has been assigned to handle this submission. Please refer to File No. D6455 in any written response to this letter so that your correspondence will be properly channeled.

Sincerely,

JAMES P. TURNER
Acting Assistant Attorney General
Civil Rights Division

By:

GERALD W. JONES
Chief, Voting Section

PERRY, WALTERS, LIPPITT & CUSTER
Attorneys at Law
409 North Jackson Street
Post Office Box 527
Albany, Georgia 31703

April 27, 1981

Mr. James P. Turner
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

Re: JPT:CWG:HEW:spk
DJ 166-012-3
File D6455

Dear Mr. Turner:

Yours of April 23, 1981 concerning the contention that the Dougherty County Board of Education may have made a change in voting practices or procedures falling within the purview of Section 5 of the Voting Rights Act of 1965 acknowledged.

You refer to an article appearing on Wednesday, April 23, 1980 in The Albany Herald as information you rely upon concerning the contention that there has been a change in voting practices or procedures. This article apparently stated "the Dougherty County Board of Education voted 5 to 1 not to grant 'any leave of absence to its personnel for political purposes.'" You advise that it is your understanding that previously the board granted unpaid leaves of absence, thus your opinion that a change in procedures had taken place.

The policy of the Dougherty County Board of Education (Rule 58) pertaining to political leave was held to be in violation of Section 5 of the Voting Rights Act of 1965 by the Supreme Court of the United States in the case of *Dougherty County Board of Education v. White*, 439 U.S. 32, 58 LEd 269, 99 SCt. 368 (1978). Prior to Rule 58 the Dougherty County Board of Education had no policy with regard to political leaves and clearly the Supreme Court eliminated Rule 58 as a policy of the Dougherty County Board of Education.

All contract employees of the Dougherty County School System are expected to fulfill their contracts. All parties executing contracts are so advised. Between the time of the decision of the Supreme Court and the present, there have been requests from contract personnel for leaves of absence for specified reasons, including political leaves. Some have been granted and some have been denied. However, as stated above, the only policy the Dougherty County Board of Education has concerning leaves is that all contract personnel are expected to comply with the provisions of their contract. I can not believe that such expectations are contrary to the provisions of the Voting Rights Act of 1965.

I will be happy to provide you with any further information you desire or I will be happy to discuss this matter with you at any time.

Sincerely,

/s/ Jesse W. Walters
JESSE W. WALTERS

June 30, 1981

Jesse W. Walters, Esq.
Perry, Walters, Lippitt & Custer
409 North Jackson Street
P.O. Box 527
Albany, Georgia 31703

Dear Mr. Walters:

This is in response to your letter of April 27, 1981, in which you indicated that the Dougherty County Board of Education position is that it need not submit its policy regarding political leaves of absence for review pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. For the reasons stated in our letters to you of February 11, 1981, and April 23, 1981, we continue to believe that the changes in the board's treatment of political leave requests are subject to the preclearance requirements of Section 5. Thus, we again request that you submit for Section 5 review the board's standards, practices and procedures regarding the granting of leave for political purposes.

If you have any questions concerning this matter, please feel free to call Ms. Hallue Wright (202-724-7170), who has been assigned to handle this submission. Please refer to File No. D6455 in any written correspondence so that your letter will be properly channeled.

In view of the pending litigation on this matter in the United States District Court for the Middle District of Georgia, we are providing copies of this letter to the court and to all counsel of record.

Sincerely,

JAMES P. TURNER
Acting Assistant Attorney
General
Civil Rights Division

By:

GERALD W. JONES
Chief, Voting Section

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10181